No. _____
(21A649)

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN GONZALES,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Filed 11/23/21 P. v. Gonzales CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BRIAN GONZALES, Defendant and Appellant.	B306537 (Los Angeles County Super. Ct. No. LA082639)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan Schneider, Judge. Affirmed in part, vacated in part and remanded.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and

David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In January 2016, appellant Brian Gonzales confronted his ex-girlfriend Emily Fox and her new boyfriend Jerred Scott in a hallway outside Fox's apartment and learned that Fox was dating Scott. Appellant reacted to this discovery by drawing a gun, causing Scott to flee. Appellant pursued him and forced him to return at gunpoint. After discovering that Fox had called the police while he was chasing Scott, appellant shot and killed them both. He was charged with two counts of murder. Each count was accompanied by firearm and multiple murder allegations under Penal Code sections 12022.53, subdivision (d) (section 12022.53(d)) and 190.2, subdivision (a)(3) (section 190.2(a)(3)).[1] Count two (the murder of Scott) was also accompanied by an allegation that Scott's murder was committed during a kidnapping under section 190.2, subdivision (a)(17) (section 190.2(a)(17)). Appellant pled not guilty.

At a pretrial hearing, appellant's counsel indicated he intended to present a "heat of passion" defense and wanted to call an expert to testify about which region of the brain was active when a person acted during the heat of passion.

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[1] Undesignated statutory references are to the Penal Code.

The court declined to permit such testimony, finding that a juror would know from common experience that a person could act in such a manner, and concluding it was not helpful to explain where in the brain such actions originated. After all witnesses had testified and both counsel had given their closing arguments, the jury was presented with verdict forms regarding each murder count and all charged special circumstances. The verdict form for Fox's murder additionally contained the uncharged special circumstance that her murder occurred during a kidnapping. The jury convicted appellant of all counts and found true all special circumstances, including the uncharged one. The court sentenced appellant to life without the possibility of parole for each murder count based on both the true multiple murder findings and the true kidnapping findings. The court additionally sentenced appellant to 25 years to life for each of the true firearm findings, arriving at a total sentence of life without the possibility of parole, plus 50 years to life. The court also imposed various fines and fees.

Appellant makes five arguments on appeal: (a) the court erred in excluding the expert testimony; (b) the court erred in sentencing appellant based on the true finding that Fox's murder occurred during a kidnapping; (c) the court erred in imposing fines and fees without determining appellant's ability to pay; (d) the instruction the court gave regarding reasonable doubt was inadequate to inform the jury that each element of each offense and special circumstance was required to be proven beyond a reasonable

doubt; and (e) the cumulative prejudicial effect of the errors in excluding the expert testimony and inadequately instructing on reasonable doubt warrants reversal.

We conclude that: (a) the court did not err in excluding the expert testimony; (b) the court erred in basing appellant's sentence in count one (Fox's murder) in part on the true finding on an uncharged special circumstance; (c) appellant forfeited any objections to the imposed fines and fees by failing to raise the issue when they were imposed; (d) our Supreme Court has already rejected appellant's argument regarding the reasonable doubt instruction, and we are bound to follow its decision; and (e) because the court did not err in excluding the expert testimony or instructing on reasonable doubt, there is no cumulative error. We therefore vacate that portion of the judgment basing appellant's sentence in count one on section 190.2(a)(17), and remand with directions to modify the abstract of judgment to remove this section as a basis for the sentence imposed on count one (and to correct the other errors discussed below). We otherwise affirm.

STATEMENT OF RELEVANT FACTS

A. *Pre-Trial*

After an August 2017 preliminary hearing, the court originally held appellant to answer on two counts of murder, with additional allegations that there were multiple murders, that the murders were committed with a firearm, and that they were committed in the course of a kidnapping

pursuant to section 190.2(a)(17). When the prosecutor asked to clarify to which count the kidnapping allegation pertained, the court responded: "It's not specified and it occurred during the course of a crime for both, so the court will find it as to both. It is not specified in the complaint as to which count." Immediately thereafter, however, the court stated, "There is sufficient evidence as to both, but the court will hold him to answer as charged as to count two [Scott's murder] only." Two weeks later, the People filed an information charging appellant with two counts of murder, and alleging both that appellant used a firearm in each murder (§ 12022.53(d)[2]), and that each murder involved multiple murders (§ 190.2(a)(3)[3]). A kidnapping special

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[2] (§ 12022.53(d) ["Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life"].)

[3] (§ 190.2(a)(3) ["The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found . . . to be true: [¶] . . . [¶] (3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree"].)

circumstance (§ 190.2(a)(17)[4]) was alleged only as to count two, Scott's murder. Appellant pled not guilty to all counts.

At a January 2020 pretrial hearing in which appellant's counsel explained he intended to pursue a "heat of passion" defense, the court was asked to permit appellant's expert to testify that the limbic system (the emotional part of the brain) can "'hijack'" and deactivate the prefrontal cortex of the brain (where premeditation occurs) when a person is sufficiently "'aroused'" or "'enraged.'" The court declined, opining that "where[] within the brain these issues are formed is not as important as the fact that they were formed." The court found the proffered testimony was unnecessary and would confuse the issues, both because the expert could not testify as to what had happened in appellant's brain, and because the jury was "eminently qualified to determine the impact on formation of premeditation and deliberation or of fear or anger or sadness . . . . They don't need to know specifically, where, within the brain, it is formed to do that." The court concluded it would "mislead[] the jury to worry about the complicated brain functioning" unnecessarily, and that there was "some consumption of time issue . . . ."

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[4] (§ 190.2(a)(17) ["The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found . . . to be true: [¶] . . . [¶] (17) The murder was committed while the defendant was engaged in . . . (B) Kidnapping in violation of Section 207, 209, or 209.5"].)

B. *Trial*

1. Testimony

Trial began in late January 2020. In the prosecutor's opening statement, he informed the jury that it would "hear evidence about how this defendant killed Jerred [Scott] in the commission of kidnapping" but did not similarly state that appellant had killed Fox in the commission of kidnapping. In the opening statement of appellant's counsel, he claimed appellant had shot both Fox and Scott "without premeditation and without deliberation," but rather as a reaction to discovering Fox had called the police on him, and seeing Scott step toward him.

Multiple witnesses testified at trial, including appellant and his family and friends, Fox's family and friends, and several professionals (police officers, a criminalist, a firearm examiner, and a coroner). All the witnesses agreed on the basic facts.

After Fox and appellant began dating in late 2013, appellant was verbally and physically abusive toward Fox. In one incident, Fox's best friend, Amanda Morton, was driving Fox and appellant to a restaurant. When appellant learned they were going to the Inglewood location of the restaurant instead of the Hollywood location, he began yelling and screaming at Fox, calling her a bitch, claiming she had lied, and demanding to be taken home. Fox began crying, and when Morton asked Fox if appellant always treated her in this manner, she confirmed he did. Also played at trial was a recording Fox had made of a

conversation between appellant and her, in which appellant apologized for choking Fox and throwing her on the couch. Morton testified that Fox had told her appellant had "[held] guns to her head," and was very controlling. From mid to late 2015, Fox began expressing a desire to break up with appellant.

By December 25, 2015, when Fox visited Morton in Dallas, Fox had broken up with appellant, had asked that his belongings be removed from her apartment, and had begun dating Scott. While Fox was visiting Morton, appellant called Fox and angrily told her that "when she got back into town . . . she had to watch her back because there was going to be bloodshed."

Though appellant moved out of Fox's apartment shortly after the new year and took most of his belongings with him, he left some personal items behind due to insufficient space in the car he was using for the move. Appellant testified that he believed he and Fox were "on a break," but had agreed not to date other people.

In January 2016, on the day of the killings, appellant was driving his 16-year-old cousin Kamal Jenkins from Santa Barbara to Inglewood, when Jenkins told him he needed to use the bathroom. Appellant suggested they stop at Fox's apartment, where Jenkins could use the bathroom, and appellant could both retrieve some of his clothes that were still there and say hello to Fox. Appellant attempted to contact Fox through various means, but received no response until he had already arrived and was pulling into the

apartment complex's subterranean garage. Fox's response was: "'Now isn't a good time because my mom is here.'"

Appellant parked in the garage and saw an unfamiliar vehicle in one of Fox's parking spaces, making him suspicious. He noticed that the driver's seat of this car was moved far back, leading appellant to suspect the car belonged to a man. Appellant told Jenkins to urinate in a corner of the parking garage; Jenkins complied, and then got back in appellant's car, joining him. Appellant tried to communicate with Fox again, but was unable to obtain a signal in the underground garage. Appellant then went to the trunk of his car and retrieved a gun. Before closing the trunk, he chambered a round, engaged the safety, and put the gun in his waistband.[5] He and Jenkins then rode the elevator to the third floor where Fox's apartment was located.

When they exited the elevator, Fox greeted them and gave Jenkins a hug. Shorty after, Scott approached, shook Jenkins's hand, and told appellant he did not know what Fox and appellant had "going on," but he had nothing to do with it, and had "no problems." Appellant asked Fox whether Scott was her new boyfriend, and after Fox stated he was,

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[5] Appellant testified he was armed "all the time, especially when I'm in this specific neighborhood" because it was a known Hispanic gang neighborhood, and appellant was African American; because of appellant's tattoos, other gang members often thought he was part of a gang. He claimed that arming himself in that neighborhood was simply a habit.

appellant became upset and drew his gun. Scott ran, but appellant chased him and forced him to return at gunpoint.

When appellant ran after Scott, Fox called 911 and told the operator that her ex-boyfriend had come to her property with a gun and tried to shoot her current boyfriend. After appellant returned with Scott, Scott moved next to Fox and Jenkins, and all three faced appellant. Appellant testified he saw Fox on the phone and thought, "I need to take the [gun's] safety off." He then asked Fox if she was calling the police. Appellant testified that as Fox began to answer, he saw Scott take a step toward him and he "just snapped" and "blacked out and started shooting"; Jenkins dropped to the ground and closed his eyes. A total of nine bullet casings were recovered from the scene. Appellant testified that he believed he fired from only one location, but a criminalist testified that an analysis of the bullet pathways indicated appellant was moving as he fired his gun. Fox and Scott were each shot four times; Jenkins was not shot. Appellant admitted he aimed at Scott and Fox when firing.

After he stopped shooting, appellant ran toward the stairs and Jenkins followed. The two left in appellant's car, and Jenkins called his mother. Appellant eventually dropped Jenkins off near Dodger Stadium and his mother picked him up. Several hours later, Jenkins and his mother went to the police and told them what he had seen. Two days later, appellant was apprehended without incident at a Greyhound bus station; he was sitting on a bus going to Tijuana, Mexico.

During closing argument, the prosecutor professed confidence that the jury would find appellant "guilty of two counts of first degree murder, that he kidnapped Jerred [Scott] in the commission of *that murder* and that he obviously killed both victims, multiple murders." (Italics added.)

2. The Jury Finds Appellant Guilty on All Counts

Among the jury instructions given was CALCRIM No. 220, which provided that the prosecution was required to "prove a defendant guilty beyond a reasonable doubt" and that "[w]henever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt . . . ." The jury was also instructed on what was required for a true finding on a kidnapping special circumstance, but neither that instruction nor any other specified the count to which the kidnapping instruction applied. However, the verdict form for Fox's murder contained the sentence: "We further find the special circumstance allegation that the defendant committed the offense during the crime of KIDNAPPING within the meaning of Penal Code Section 190.2(a)(17) to be: _____" with "(TRUE OR NOT TRUE)" written under the blank.[6] The record is silent as to the circumstances surrounding the approval of this verdict form.

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[6] Included with the verdict forms was a special verdict form, instructing the jury that if they found appellant guilty of one
(Fn. is continued on the next page.)

During deliberations, the jury asked the court, "If we find a kidnapping occurred in regards to Count 2 (Jer[r]ed Scott), and Emily [Fox] is killed in the commission of the kidnapping, does this also constitute murder 1 in regards to Emily[?]" In discussing this question, appellant's counsel indicated his belief that the answer should be "no," but the court disagreed, stating the question was what the jury found "to be in the commission of the kidnapping and 540A."[7] Appellant's counsel then asked, "wasn't the DA's theory, that limits that theory to Jerred Scott [*sic*]?" The prosecutor responded that this was "incorrect" and "ridiculous." The court's response to the jury was: "The court refers the jury to the homicide instructions already provided." The jury found appellant guilty of the first degree murders of Fox and Scott. It further found true the allegation as to each murder that it was committed during the crime of kidnapping, and that appellant intentionally

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charge of first degree murder, and one additional charge of either first degree or second degree murder, they were to determine whether "the multiple murder special circumstance within the meaning of Penal Code section 190.2(a)(3)" was true.

[7] Instruction 540A provided that the defendant was charged with two counts of first degree felony murder, and that to prove defendant's guilt, the prosecution was required to prove, among other elements, that "[w]hile committing kidnapping[,] the defendant caused the death of another person."

discharged a firearm in committing the crimes. The jury found true the multiple murder special circumstance.[8]

The court sentenced appellant to life imprisonment without the possibility of parole for each count due to both the true finding on the kidnapping special circumstance, and the true finding on the multiple murder special circumstance. The court imposed an additional 25 years to life for each true finding that appellant discharged a firearm and caused great bodily injury, resulting in a total sentence of life without the possibility of parole, plus an additional 50 years to life.[9] The court also ordered appellant to pay various fines and fees. Appellant timely appealed.

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[8] In June 2020, appellant moved for a new trial, arguing that he had been relying on a "heat of passion defense," but was prevented from presenting expert testimony to explain that complex thought processes and impulsive decisions were governed by different regions of the brain, and that when sufficiently aroused by extreme emotion, the portion of the brain responsible for impulsive decisions could prevent premeditation. Though appellant acknowledged "it is common knowledge that people can act without thinking while in the throes of an extreme emotional state," he argued that precluding his expert from testifying deprived him of "the opportunity to establish a very critical part of its defense: an explanation as to 'how' one part of the brain can actually prevent another part of the brain from thinking clearly and exercising judgment." The court denied appellant's motion, and appellant does not challenge this ruling on appeal.

[9] Both the abstract of judgment and the minute order erroneously state that appellant was sentenced to an additional 25 years under section "1202.53(d)" instead of section

(Fn. is continued on the next page.)

DISCUSSION

A. *The Court Did Not Err in Excluding Expert Testimony About the Mechanics of How the Brain Functions*

At a pretrial hearing, the court refused to permit appellant's expert to testify that the limbic system can "'hijack'" and deactivate the prefrontal cortex of the brain (where premeditation occurs) when a person is sufficiently "'aroused'" or "'enraged,'" finding it was unnecessary, would confuse the issues, and would require too much time. Appellant contends the excluded testimony was relevant and would have aided the jury, the testimony was not confusing and did not require an undue consumption of time, and its exclusion was prejudicial.[10] We disagree.

We typically review a court's exclusion of evidence for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725 ["an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence"].) Citing *People v. Seijas* (2005) 36

12022.53(d). The abstract of judgment also erroneously states that appellant was sentenced under "190.2(a)(2) PC" (as opposed to section 190.2(a)(3)), and incorrectly lists his attorney as "TYREE A. ALMADA, DDA" instead of "TYREE CAMPBELL." (Manuel A. Almada was the prosecutor.)

[10] Appellant also argues that the testimony did not violate sections 28 and 29 (pertaining to expert testimony regarding a defendant's mental disease, defect, or disorder). Because the court did not exclude the testimony under those sections, we need not address this argument.

Cal.4th 291, appellant contends that because this ruling "deprived appellant of his constitutional right to present a defense, the de novo standard should apply." We find it unnecessary to decide which standard of review applies, because we would affirm under either standard.

The primary question for the jury was whether appellant's mental state precluded him from engaging in premeditation. Though appellant acknowledges "it is common knowledge that people can act without thinking while in the throes of an extreme emotional state," he fails to explain how knowing where in the brain such decisions emanate would aid the jurors in determining whether appellant acted from impulse or premeditation. Nor do we discern any other manner in which such testimony would have been helpful. Accordingly, we conclude the court acted well within its discretion in ruling that the excluded testimony had no tendency in reason to prove or disprove that appellant was in a mental state that precluded premeditation; on an independent review, we would make the same ruling ourselves.[11]

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[11] The cases on which appellant relies are inapplicable because they deal with expert testimony on issues outside the common experience of a juror. (See *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 746 [trial court erred in precluding expert testimony regarding effect of homelessness on defendant's belief in need for self-defense]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1076, 1087 [expert testimony regarding battered woman syndrome "'would have assisted the jury in objectively analyzing [defendant's] claim of self-defense by dispelling many of the

(Fn. is continued on the next page.)

Moreover, the exclusion of this testimony did not prejudice appellant; thus had we found error, we would deem it harmless. The jury had already heard testimony (1) that appellant had been verbally and physically abusive toward Fox, (2) that he armed himself before going to see her, (3) that he did not draw his gun until Fox confirmed Scott was her new boyfriend, (4) that he chased Scott down after the latter ran, marching him back to Fox at gunpoint, (5) that he deliberately disengaged the safety of his gun after he saw Fox on the phone, and (6) that he aimed at both Fox and Scott (but not at Jenkins), and fired his gun while in motion, even though he claimed to have been shooting in a blind

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commonly held misconceptions about battered women'"]; *In re Walker* (2007) 147 Cal.App.4th 533, 552-553 [ineffective assistance of counsel due to failure to present expert testimony on battered woman syndrome, because such testimony would have helped the jury assess "the nature and extent" of defendant's fear]; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1296, 1300-1302 [expert testimony explaining why parents might not report child molestation admissible because it would aid jury in determining credibility of mother's testimony]; *People v. Coddington* (2000) 23 Cal.4th 529, 582-583 ["expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation"]; *People v. Vu* (1991) 227 Cal.App.3d 810, 813 [error to exclude expert testimony that a person's actual perception of events may have differed from reality due to stress and preconceived expectations about what might happen].) By contrast, the idea that a person, when angered, could act impulsively without premeditation is within a juror's common experience.

rage. On this record, we find beyond a reasonable doubt that hearing testimony that *if* appellant had been acting due to rage, his decisions would have emanated from his limbic system and not his prefrontal cortex, would have made no difference in the jury's verdict.[12]

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[12] Appellant's reliance on *People v. Cortes* (2011) 192 Cal.App.4th 873 is misplaced. In *Cortes*, where the defendant was accused of stabbing the victim to death, an expert was prepared to testify that the defendant was acting out of fear, and that his mental function was overwhelmed and impaired during the fight. (*Id.* at 877, 885, 894.) However, the court precluded the expert from offering any testimony about the defendant's mental state and functioning, or his past or present psychiatric disorders or diagnoses, thus "effectively eviscerat[ing] any defense defendant had to premeditated and deliberated murder" and "prevent[ing] the jury from properly evaluating evidence that would have been relevant to its consideration of the self-defense, imperfect self-defense and heat of passion instructions given here." (*Id.* at 912 & 899-900.) Here, by contrast, appellant's expert would not have testified to whether appellant had entered into a state of rage, or whether he was predisposed to do so. The exclusion of the testimony did not "eviscerate" appellant's defense, but merely prevented the jury from learning what part of the brain is responsible for the actions of a person in an emotionally charged state. *Cortes* is thus inapposite.

B. *The Court Erred in Sentencing Appellant Based on the True Finding of the Kidnapping Special Circumstance as to Fox's Murder*

The jury's finding that Fox's murder occurred "during the crime of KIDNAPPING within the meaning of Penal Code Section 190.2(a)(17)" constituted one of the bases for the court to sentence appellant on that count to life imprisonment without the possibility of parole.[13] Appellant contends the court erred in sentencing him based on this true finding because the kidnapping special circumstance was never alleged as to Fox's murder. The People counter that appellant has forfeited this argument, and that regardless, appellant was given adequate notice that the kidnapping special circumstance applied to Fox's murder as well. While we recognize that appellant makes this argument for the first time on appeal, we exercise our discretion to consider it, and find it meritorious.

1. We Exercise Our Discretion to Consider Appellant's Argument

Appellant admits that he "did not object to the lack of a specific kidnapping special circumstance in count 1," but argues that he did not forfeit this argument because "he put the court and prosecution on notice that he believed the

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[13] The other basis was the jury's finding that Fox's murder was part of a multiple murder under section 190.2(a)(3).

prosecution's kidnapping theory was only as to Scott." However, the discussion appellant references related to the jury's question: "If we find a kidnapping occurred in regards to Count 2 (Jer[r]ed Scott), and Emily [Fox] is killed in the commission of the kidnapping, does this also constitute murder 1 in regards to Emily[?]" By stating its opinion that the issue was what the jury found "to be in the commission of the kidnapping and [instruction] 540A" -- which instruction explained the elements needed to convict appellant of first degree felony murder -- the court indicated it interpreted the jury's question to be whether Scott's kidnapping could serve as the predicate felony for the felony first degree murder of Fox. Thus, when appellant's counsel stated he believed the prosecution's kidnapping theory applied only to Scott's murder, the prosecutor replied that was both "incorrect" and "ridiculous." The statement of appellant's counsel does not constitute an objection that the kidnapping special circumstance was improperly applied to Fox's murder.

However, while appellant failed to object adequately, we have discretion to consider his appeal on this issue. We find instructive our Supreme Court's recent case of *People v. Anderson* (2020) 9 Cal.5th 946 (*Anderson*). There, the defendant was charged with one count of murder and five counts of robbery. (*Id.* at 949, 950.) In connection with the murder count, the defendant "was subject to a 25-year-to-life enhancement based on vicarious liability for the injurious discharge of a firearm by a coparticipant in a gang-related

offense." (*Id.* at 951.) "By contrast, in connection with each of the robbery counts, . . . the information alleged two personal use firearm enhancements—one a 10-year enhancement . . . and the other a three-, four-, or 10-year enhancement . . . ." (*Ibid.*) But after the close of evidence, "[t]he trial court instructed the jury that it could find that the prosecution proved the elements of the 25-year-to-life vicarious firearm discharge enhancements under section 12022.53(e) as to the robbery counts—even though they were not alleged in the operative information—and approved verdict forms to the same effect. The record does not show definitively how this occurred, but it appears the prosecution requested this instruction as to the robbery counts after the close of the evidence." (*Ibid.*) The jury convicted on all counts and returned true findings on all enhancement allegations. (*Ibid.*) At sentencing, the court imposed the 25-year-to-life enhancements on each of the five robbery counts over the defendant's Eighth Amendment objection, and the defendant appealed. (*Anderson, supra,* at 952.)

On appeal, the defendant argued for the first time that the enhancements could not be imposed because they had not been adequately pled in the charging document. (*Anderson*, *supra*, 9 Cal.5th at 952.) Because the 25-year-to-life enhancement had been pled as to the murder count, the Court of Appeal affirmed the judgment, and the Supreme Court granted review. (*Ibid.*) On the issue of forfeiture, the Supreme Court found that although the defendant failed to object at trial that he could not be subjected to the 25-year-

to-life enhancements for the robbery counts because they were not pled, the court should still consider the issue because (1) the error was "clear and obvious"; (2) "the error affected substantial rights by depriving Anderson of timely notice of the potential sentence he faced"; and (3) "the error was one that goes to the overall fairness of the proceeding." (*Id.* at 963.) We address the same considerations here and exercise our discretion to consider the merits of appellant's appeal on this issue.

2. The Court Erred in Sentencing Appellant on the Uncharged Special Circumstance

In *Anderson*, our Supreme Court held that the defendant could not be sentenced based on true findings on unpled enhancements because the defendant "was entitled to a pleading that provided him with fair notice that he faced 25-year-to-life enhancements under section 12022.53(e) as to each charged robbery offense if this was the prosecution's intent." (*Anderson*, *supra*, 9 Cal.5th at 955.) The court elaborated that "[a] pleading that alleges an enhancement as to one count does not provide fair notice that the same enhancement might be imposed as to a different count. When a pleading alleges an enhancement in connection with one count but not another, the defendant is ordinarily entitled to assume the prosecution made a discretionary choice not to pursue the enhancement on the second count, and to rely on that choice in making decisions such as

whether to plead guilty or proceed to trial." (*Id.* at 956.) "Fair notice requires that every sentence enhancement be pleaded in connection with every count as to which it is imposed." (*Id.* at 956-957.) The court also rejected the Attorney General's argument that defense counsel's agreement to the verdict forms containing the 25-year-to-life enhancements for the robbery counts constituted an informal agreement to amend the information, finding that "to treat defense counsel's lack of objection as acquiescence or consent would go a long way toward eroding Anderson's right to notice of the potential penalties he faced." (*Id.* at 960.)

The facts in the instant appeal are strikingly similar: just as the more severe firearm enhancements in *Anderson* were pled only as to some of the counts, so too was the kidnapping special circumstance in the instant case pled only as to count two, Scott's murder. In both cases, while the information was never amended to add the unpled enhancements to other counts, the verdict forms for those other counts contained a space for the jury to make a true finding as to the unpled enhancements, and the jury did so. The court in both cases then imposed sentences based on those true findings.

The People attempt to distinguish *Anderson*, arguing that unlike the defendant there, "appellant had notice that the kidnapping special circumstance pertaining to the kidnapping of Scott was at issue" because "it was alleged in the information as to count 2 and the jury verdict forms contained the kidnapping special circumstance as to both

counts." But in *Anderson*, the defendant also had notice that the more severe firearm enhancements were at issue because they were alleged in connection with the murder count, and also were contained in the jury verdict forms. (*Anderson*, *supra*, 9 Cal.5th at 951.) Here, the kidnapping special circumstance was neither alleged in connection with the murder of Fox (count one) nor alluded to by the prosecutor.

In support of their argument that we should find forfeiture or that appellant impliedly consented to the application of the kidnapping special circumstance to Fox's murder, the People cite *People v. Houston* (2012) 54 Cal.4th 1186 (*Houston*); *People v. Ward* (2005) 36 Cal.4th 186 (*Ward*), *People v. Toro* (1989) 47 Cal.3d 966 (*Toro*), and *People v. Valenzuela* (2011) 199 Cal.App.4th 1214 (*Valenzuela*). We find these cases inapposite.

In *Houston*, while the indictment "did not allege that the attempted murders were deliberate and premeditated," the court undertook several actions that made clear the jury would be asked to determine deliberation and premeditation. (*Houston*, *supra*, 54 Cal.4th at 1226.) These included presenting the parties with a "preliminary draft of the verdict forms, which indicated that the court would ask the jury to determine whether the attempted murders were willful, deliberate, and premeditated"; specifically stating its belief that the prosecution was "intending to charge premeditated attempted murder" with a penalty of life imprisonment and instructing counsel to correct the court if

they disagreed; and announcing "its intent to have the attempted murder verdict form list deliberate and premeditated attempted murder as 'a special finding'" and "instruct[ing] the jurors . . . to determine whether the attempted murders were willful, deliberate, and premeditated." (*Ibid.*) Because the defendant did not object at any of these points, or at sentencing, the Supreme Court found the defendant had forfeited any argument concerning a defective indictment. Here, unlike *Houston*, there was no midtrial discussion highlighting the prosecution's intent to apply the kidnapping special circumstance to Fox's murder. (See *Anderson*, *supra*, 9 Cal.5th at 963 ["unlike *Houston* . . . there was no midtrial discussion highlighting the prosecution's intent to seek the more serious vicarious firearm enhancements instead of the less serious personal use enhancements charged in the information"].)

In *Ward*, the defendant was charged initially with multiple murders and a "multiple-murder special circumstance" under section 190.2(a)(3). (*Ward*, *supra*, 36 Cal.4th at 193.) The defendant then successfully moved to sever the murder charges such that he was tried in one trial for one murder, and a subsequent trial for the second murder. (*Ibid.*) After he was convicted of murder by the first jury, the second jury also found true an allegation that "[t]he defendant was convicted previously of murder in the first or second degree" pursuant to section 190.2, subdivision (a)(2). (*Ward, supra,* at 219.) On appeal, the defendant argued he could not be punished under subdivision (a)(2),

because he was charged under subdivision (a)(3). (*Ward,* at 218-219.) Our Supreme Court rejected this argument, first noting that both subdivisions "'are plainly complementary, and were evidently intended to define a single basic special circumstance—multiple murder—which can be satisfied by convictions in a single proceeding or in more than one proceeding'" and then finding that "defendant, by accepting the jury instruction and the jury's finding on the allegedly uncharged special circumstance, acquiesced in the special circumstance finding. Indeed, defendant expressly acknowledged that severance of his murder charges would result in the application of section 190.2, subdivision (a)(2). As such, no amendment of the information was necessary . . . ." (*Id.* at 219, italics omitted.) Here, by contrast, there was no complementary kidnapping special circumstance alleged as to Fox's murder, there was no acknowledgment that this special circumstance applied to Fox's murder, and although appellant agreed to a kidnapping special circumstance jury instruction, there was no indication that this kidnapping special circumstance instruction applied to Fox's murder, as opposed to only Scott's murder.

In *Toro*, our Supreme Court considered whether a jury could convict on an uncharged lesser related offense (battery with serious bodily injury when the defendant was charged with attempted murder). (*Toro*, *supra*, 47 Cal.3d at 969.) The court concluded that "when a lesser related offense is submitted to the jury without objection, the defendant must be regarded as having impliedly consented to the jury's

consideration of the offense . . . ." (*Id.* at 970.) But as our Supreme Court clarified in *Anderson*, *Toro* "was quite different from the situation we confront in this case" because "[u]nlike the defendant in *Toro*, Anderson derived no possible benefit from submitting the unpleaded 25-year-to-life enhancements to the jury. There is therefore no reason to presume from defense counsel's silence that Anderson consented to this procedure." (*Anderson*, *supra*, 9 Cal.5th at 959.) Similar to *Anderson*, and unlike *Toro*, appellant derived no possible benefit from submitting to the jury the unpled kidnapping special circumstance as applied to Fox's murder.

Finally, in *Valenzuela*, the defendant was charged with murder. (*Valenzuela*, *supra*, 199 Cal.App.4th at 1217.) The jury found true a special circumstance of shooting from a motor vehicle, even though this circumstance was not charged in the information. (*Id.* at 1236.) On appeal, the defendant argued this was improper, but the Court of Appeal disagreed because the trial court had specifically informed counsel it intended to instruct on this special circumstance, and defense counsel had stated she had no objection. (*Id.* at 1236-1237.) Here, nothing in the record suggests anyone asked appellant's counsel whether he objected to applying the kidnapping special circumstance allegation to Fox's murder.

3. Resentencing Is Unnecessary

Following *Anderson*, we conclude the court erred in sentencing appellant based on the true finding of an uncharged special circumstance. We need not remand for resentencing, however, as the mandatory life sentence imposed on count one (Fox's murder) was also based on the jury's true finding under section 190.2(a)(3) (multiple murder). This finding is unchallenged. Because correcting the court's error will not alter appellant's sentence in any way, we vacate section 190.2(a)(17) as a basis for appellant's sentence on count one, and remand with directions that the court modify the abstract of judgment accordingly. Specifically, any reference to section 190.2(a)(17) should state it is a basis for the sentence only on count two (Scott's murder). Based on the jury's true finding of the multiple murder special circumstance on count one, appellant remains subject to the same life-without-parole sentence on that count.

C. *The Court Did Not Err in Imposing Fines and Fees*

Though appellant now argues the court erred in imposing various fines and fees at sentencing without determining his ability to pay, he admits he failed to object to these fines and fees in the trial court. We agree with our colleagues in Division Eight that a failure to object in the trial court forfeits this issue on appeal. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155; accord,

People v. Keene (2019) 43 Cal.App.5th 861.) Accordingly, we do not consider appellant's contentions.

D. *The Court Did Not Err in Instructing the Jury*

Appellant contends the court erred by failing to instruct the jury that every element of every offense was required to be proven beyond a reasonable doubt, and argues that the issue is preserved on appeal despite his failure to object. Appellant acknowledges that our Supreme Court has rejected this argument and that we are obligated to follow its decisions. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 910-911 [appellant's failure to object forfeited claim that court erred by failing to instruct every element must be proved beyond reasonable doubt; in any case, this claim is rejected]; *People v. Mackey* (2015) 233 Cal.App.4th 32, 87 ["we are bound to follow our state Supreme Court's decisions"].)

E. *There Was No Cumulative Error*

Appellant argues that "the court's exclusion of expert testimony, combined with its failure to explicitly instruct the jury that it must find each element of all crimes and allegations proved beyond a reasonable doubt" constituted cumulative error that warrants reversal. Because we conclude the court did not err in these instances, we find no cumulative error.

DISPOSITION

We vacate the judgment to the extent the true finding under section 190.2(a)(17) on count one (Fox's murder) was a basis for appellant's sentence on that count. On remand, we direct the court to modify the abstract of judgment to reflect that: (1) section 190.2(a)(17) is the basis for appellant's sentence only as to count two (Scott's murder); (2) other bases for appellant's sentence on both counts are section 190.2(a)(3) (not section 190.2(a)(2)) and section 12022.53(d) (not section 1202.53(d)); and (3) appellant's counsel was Tyree Campbell (not Tyree A. Almada, DDA). The court shall forward this modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J. CURREY, J.

Court of Appeal, Second Appellate District, Division Four - No. B306537

S272489

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

BRIAN GONZALES, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT NW-V

LA082639-01

PEOPLE OF THE STATE OF CALIFORNIA

VS.

BRIAN GONZALEZ

INSTRUCTIONS GIVEN

Alan Schneider, Judge Presiding

Consisting of
61 pages herein

100. Trial Process (Before or After Voir Dire)

Jury service is very important and I would like to welcome you and thank you for your service. Before we begin, I am going to describe for you how the trial will be conducted, and explain what you and the lawyers and I will be doing. When I refer to "the People," I mean the attorney from the city attorney's office who is trying this case on behalf of the People of the State of California. When I refer to defense counsel, I mean the attorney who is representing the defendant, Fausto Ayala.

The first step in this trial is jury selection.

During jury selection, the attorneys and I will ask you questions. These questions are not meant to embarrass you, but rather to determine whether you would be suitable to sit as a juror in this case.

The trial will then proceed as follows: The People may present an opening statement. The defense is not required to present an opening statement, but if it chooses to do so, it may give it either after the People's opening statement or at the beginning of the defense case. The purpose of an opening statement is to give you an overview of what the attorneys expect the evidence will show.

Next, the People will offer their evidence. Evidence usually includes witness testimony and exhibits. After the People present their evidence, the defense may also present evidence but is not required to do so. Because he is presumed innocent, the defendant does not have to prove that he is not guilty.

After you have heard all the evidence and before the attorneys give their final arguments, I will instruct you on the law that applies to the case.

After you have heard the arguments and instructions, you will go to the jury room to deliberate.

101. Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected)

Our system of justice requires that trials be conducted in open court with the parties presenting evidence and the judge deciding the law that applies to the case. It is unfair to the parties if you receive additional information from any other source because that information may be unreliable or irrelevant. Your verdict must be based only on the evidence presented during trial in this court and the law as I provide it to you.

During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. Do not share information about the case in writing, by email, by telephone, on the Internet, or by any other means of communication. You must not talk about these things with other jurors either, until you begin deliberating.

As jurors, you may discuss the case together only after all of the evidence has been presented, the attorneys have completed their arguments, and I have instructed you on the law. After I tell you to begin your deliberations, you may discuss the case only in the jury room, and only when all jurors are present.

You must not allow anything that happens outside of the courtroom to affect your decision. During the trial, do not read, listen to, or watch any news report or commentary about the case from any source.

Do not use the Internet Do not investigate the facts or law. Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or

investigate.

If you have a cell phone or other electronic device, keep it turned off while you are in the courtroom and during jury deliberations. An electronic device includes any data storage device. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you without delay.

During the trial, do not speak to a defendant, witness, lawyer, or anyone associated with them. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.

If you receive any information about this case from any source outside of the trial, even unintentionally, do not share that information with any other juror. If you do receive such information, or if anyone tries to influence you or any juror, you must immediately tell the bailiff.

Keep an open mind throughout the trial. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations. Do not take anything I say or do during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.

Do not let bias, sympathy, prejudice, or public opinion influence your decision.

You must reach your verdict without any consideration of punishment.

When the trial has ended and you have been released as jurors, you may discuss the case with anyone.

102. Note-Taking

You have been given notebooks and may take notes during the trial. Do not remove them from the courtroom. You may take your notes into the jury room during deliberations. I do not mean to discourage you from taking notes, but here are some points to consider if you take notes:

1. Note-taking may tend to distract you. It may affect your ability to listen carefully to all the testimony and to watch the witnesses as they testify;

AND

2. The notes are for your own individual use to help you remember what happened during the trial. Please keep in mind that your notes may be inaccurate or incomplete.

At the end of the trial, your notes will be collected and destroyed.

103. Reasonable Doubt

I will now explain the presumption of innocence and the People's burden of proof. The defendant has pleaded not guilty to the charges. The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.

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104. Evidence

You must decide what the facts are in this case. You must use only the evidence that is presented in the courtroom. "Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence. The fact that the defendant was arrested, charged with a crime, or brought to trial is not evidence of guilt.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they help you understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asks a question

that suggests it is true.

During the trial, the attorneys may object to questions asked of a witness. I will rule on the objections according to the law. If I sustain an objection, the witness will not be permitted to answer, and you must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did. If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you see or hear when the court is not in session, even if it is done or said by one of the parties or witnesses.

The court reporter is making a record of everything said during the trial. If you decide that it is necessary, you may ask that the court reporter's record be read to you. You must accept the court reporter's record as accurate.

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105. Witnesses

You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

- How well could the witness see, hear, or otherwise perceive the things about which the witness testified?
- How well was the witness able to remember and describe what happened?
- What was the witness's behavior while testifying?
- Did the witness understand the questions and answer them directly?
- Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?
- What was the witness's attitude about the case or about testifying?
- Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?
- How reasonable is the testimony when you consider all the other evidence in the case?
- Did other evidence prove or disprove any fact about which the witness testified?
- Did the witness admit to being untruthful?
- Has the witness been convicted of a felony?

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People

sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.

If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.

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121. Duty to Abide by Translation Provided in Court

Some testimony may be given in Spanish. An interpreter will provide a translation for you at the time that the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the bailiff.

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124. Separation Admonition

You may be permitted to separate during recesses and at the end of the day. I will tell you when to return. Please remember, we cannot begin the trial until all of you are in place, so it is important to be on time.

Remember, do not talk about the case or about any of the people or any subject involved in it with anyone, including the other jurors. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations.

200.

Members of the jury, I will now instruct you on the law that applies to this case. I will give you a copy of the instructions to use in the jury room.

You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial.

You must not let bias, prejudice, or public opinion influence your assessment of the evidence or your decision. Many people have assumptions and biases about or stereotypes of other people and may be unaware of them. You must not be biased in favor of or against any party, witness, attorney, defendant, or alleged victim because of his or her disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, or sexual orientation.

You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.

Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.

Do not use the Internet in any way in connection with this case, either on your own or as a group. Do not investigate the facts or the law or do any research regarding this case, either on your own, or as a group. Do not conduct any tests or experiments or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

202.

Your notes are for your own individual use to help you remember what happened during the trial. Please keep in mind that your notes may be inaccurate or incomplete.

If there is a disagreement about the testimony at trial, you may ask that the court reporter's record be read to you. It is the record that must guide your deliberations, not your notes. You must accept the as accurate.

Please do not remove your notes from the jury room.

At the end of the trial, your notes will be collected and destroyed.

220.

The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt, unless I specifically instruct you otherwise.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.

223.

Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. Circumstantial evidence also may be called indirect evidence. *Circumstantial evidence* does not directly prove the fact to be decided but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.

Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence.

225.

The People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent and mental state. The instruction for the crime and allegation explains the intent and mental state required.

An intent and mental state may be proved by circumstantial evidence.

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent and mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent and mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent and mental state and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent and mental state was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

- How well could the witness see, hear, or otherwise perceive the things about which the witness testified?
- How well was the witness able to remember and describe what happened?
- What was the witness's behavior while testifying?
- Did the witness understand the questions and answer them directly?
- Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?
- What was the witness's attitude about the case or about testifying?
- Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?
- How reasonable is the testimony when you consider all the other evidence in the case?
- Did other evidence prove or disprove any fact about which the witness testified?
- What is the witness's character for truthfulness?
- Has the witness engaged in other conduct that reflects on his or her believability?

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good.

If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.

If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.

251.

The crime and other allegation charged in this case requires proof of the union, or joint operation, of act and wrongful intent.

For you to find a person guilty of the crime in this case, that person must not only intentionally commit the prohibited act but must do so with a specific intent and mental state. The act and the specific intent and mental state required are explained in the instruction for that crime or allegation.

300.

Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant.

301.

Unless I instruct you otherwise, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

302.

If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.

303.

During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.

318.

You have heard evidence of statements that witnesses made before the trial. If you decide that the witness made those statements, you may use those statements in two ways:

1. To evaluate whether the witness's testimony in court is believable;

AND

2. As evidence that the information in those earlier statements is true.

332.

Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate.

You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

333.

Witnesses, who were not testifying as experts, gave their opinions during the trial. You may but are not required to accept those opinions as true or correct. You may give the opinions whatever weight you think appropriate. Consider the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

Before you may consider the testimony of Kamal Jenkins as evidence against the defendant, you must decide whether Kamal Jenkins was an accomplice. A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if:

1. He or she personally committed the crime;

OR

2. He or she knew of the criminal purpose of the person who committed the crime;

AND

3. He or she intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime.

The burden is on the defendant to prove that it is more likely than not that Kamal Jenkins was an accomplice.

An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime is being committed and does nothing to stop it.

A person may be an accomplice even if he or she is not actually prosecuted for the crime.

If you decide that a witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her testimony as you would that of any other witness.

If you decide that a witness was an accomplice, then you may not convict the defendant of murder based on his or her testimony alone. You may use testimony of an accomplice that tends to incriminate the defendant to convict the defendant only if:

1. The accomplice's testimony is supported by other evidence that you believe;

2. That supporting evidence is independent of the accomplice's testimony;

AND

3. That supporting evidence tends to connect the defendant to the commission of the crime.

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting

evidence must tend to connect the defendant to the commission of the crime.

The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice.

Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

350.

You have heard character testimony that defendant is a peaceful and non-violent person.

Evidence of the defendant's character for peacefulness can by itself create a reasonable doubt whether the defendant committed murder. However, evidence of the defendant's good character may be countered by evidence of his bad character for the same trait. You must decide the meaning and importance of the character evidence.

If the defendant's character for certain traits has not been discussed among those who know him, you may assume that his character for those traits is good.

You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt.

351.

The attorney for the People was allowed to ask defendant's character witnesses if they had heard that the defendant had engaged in certain conduct. These "have you heard" questions and their answers are not evidence that the defendant engaged in any such conduct. You may consider these questions and answers only to evaluate the meaning and importance of a character witness's testimony.

358.

You have heard evidence that the defendant made oral statements to Emily Fox, Amanda Moreton, and Kamal Jenkins before the trial. You must decide whether the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements.

Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded.

359.

The defendant may not be convicted of any crime based on his out-of-court statements alone. You may rely on the defendant's out-of-court statements to convict him only if you first conclude that other evidence shows that the charged crime or a lesser included offense was committed.

That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

This requirement of other evidence does not apply to proving the identity of the person who committed the crime and the degree of the crime. If other evidence shows that the charged crime or a lesser included offense was committed, the identity of the person who committed it and the degree of the crime may be proved by the defendant's statements alone.

You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt.

362.

If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt.

If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.

370.

The People are not required to prove that the defendant had a motive to commit the crime charged. In reaching your verdict you may, however, consider whether the defendant had a motive.

Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.

372.

If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.

852A.

The People presented evidence that the defendant committed domestic violence that was not charged in this case.

Domestic violence means abuse committed against an adult who is a person who dated or is dating the defendant.

Abuse means intentionally or recklessly causing or attempting to cause bodily injury or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit murder as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder. The People must still prove each charge and allegation beyond a reasonable doubt.

500.

Homicide is the killing of one human being by another. Murder and manslaughter are types of homicide. The defendant is charged with murder. Manslaughter is a lesser offense to murder.

A homicide can be lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter. You must decide whether the killing in this case was unlawful and, if so, what specific crime was committed. I will now instruct you in more detail on the different types of murder and manslaughter.

520.

The defendant is charged in Count 1 and 2 with murder.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant committed an act that caused the death of another person;

AND

2. When the defendant acted, he had a state of mind called malice aforethought;

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant had *express malice* if he unlawfully intended to kill.

The defendant had *implied malice* if:

1. He intentionally committed the act;

2. The natural and probable consequences of the act were dangerous to human life;

3. At the time he acted, he knew his act was dangerous to human life;

AND

4. He deliberately acted with conscious disregard for human life.

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to

happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521 and 540A.

521.

The defendant has been prosecuted for first degree murder under two theories: (1) the murder was willful, deliberate, and premeditated and (2) under a theory of first degree felony murder, which is defined in Instruction 540A.

Each theory of first degree murder has different requirements, and I will instruct you on both.

You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.

A. Deliberation and Premeditation

The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the acts that caused death.

The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.

The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought.*

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this

burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder.

Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide.

If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.

Provocation does not apply to a prosecution under a theory of felony murder.

540A.

The defendant is charged in Count 1 & 2 with murder, under a theory of first degree felony murder.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. The defendant committed kidnapping

2. The defendant intended to commit kidnapping.

AND

3. While committing kidnapping the defendant caused the death of another person.

A person who was the actual killer may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant committed kidnapping please refer to the separate instructions that I will give you on that crime. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

The defendant must have intended to commit the felony of kidnapping before or at the time that he caused the death.

It is not required that the person killed be the intended victim of the felony.

548.

The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder.

Each theory of murder has different requirements, and I will instruct you on each.

You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory, but you must unanimously agree whether the murder is in the first or second degree.

570.

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

The defendant killed someone because of a sudden quarrel or in the heat of passion if:

1. The defendant was provoked;

2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment;

AND

3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

If enough time passed between the provocation and the killing for a person of average disposition to "cool off" and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.

The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.

For each count charging murder, you will be given verdict forms for guilty and not guilty of first degree murder and second degree murder and voluntary manslaughter.

You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of second degree murder only if all of you have found the defendant not guilty of first degree murder, and I can accept a verdict of guilty or not guilty of voluntary manslaughter only if all of you have found the defendant not guilty of both first and second degree murder.

As with all of the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision.

Follow these directions before you give me any completed and signed final verdict forms. Return the unused verdict forms to me, unsigned.

1. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, complete and sign that verdict form. Do not complete or sign any other verdict forms for that count.

2. If all of you cannot agree whether the defendant is guilty of first degree murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms for that count.

3. If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of second degree murder, complete and sign the form for not guilty of first degree murder and the form for guilty of second degree murder. Do not complete or sign any other verdict forms for that count.

4. If all of you agree that the defendant is not guilty of first degree murder but cannot agree whether the defendant is guilty of second degree murder, complete and sign the form for not guilty of first degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms for that count.

5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but also agree that the defendant is guilty of voluntary manslaughter, complete and sign the forms for not guilty of first degree murder and not guilty of second degree murder and the form for guilty of voluntary manslaughter. Do not complete or sign any other verdict forms for that count.

6. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder but cannot agree whether the defendant is guilty of voluntary manslaughter, complete and sign the forms for not guilty of first degree murder and not guilty of second degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms for that count.

7. If all of you agree that the defendant is not guilty of first degree murder, not guilty of second degree murder, and not guilty of voluntary manslaughter, complete and sign the verdict forms for not guilty of each crime. Do not complete or sign any other verdict forms for that count.

700.

If you find the defendant guilty of first degree murder, you must also decide whether the People have proved that one or more of the special circumstances is true.

The People have the burden of proving each special circumstance beyond a reasonable doubt. If the People have not met this burden, you must find the special circumstance has not been proved. You must return a verdict form stating true or not true for each special circumstance on which you all agree.

In order for you to return a finding that a special circumstance is or is not true, all 12 of you must agree.

You must consider each special circumstance separately.

705.

In order to prove the special circumstances of murder in the commission of kidnapping, the People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent or mental state. The instruction for each special circumstance explains the intent or mental state required.

An intent or mental state may be proved by circumstantial evidence.

Before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent or mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and another reasonable conclusion supports a finding that the defendant did not have the required intent or mental state, you must conclude that the required intent or mental state was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

706.

In your deliberations, you may not consider or discuss penalty or punishment in any way when deciding whether a special circumstance, or any other charge, has been proved.

721.

The defendant is charged with the special circumstance of having been convicted of more than one murder in this case.

To prove that this special circumstance is true, the People must prove that:

1. The defendant has been convicted of at least one charge of first degree murder in this case;

AND

2. The defendant has also been convicted of at least one additional charge of either first or second degree murder in this case.

731.

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of kidnapping.

To prove that this special circumstance is true, the People must prove that:

1. The defendant committed kidnapping;

2. The defendant intended to commit kidnapping;

3. The defendant did an act that was a substantial factor in causing the death of another person;

AND

4. The defendant intended that the other person be killed.

To decide whether the defendant committed kidnapping, please refer to the separate instructions that I will give you on that crime. You must apply those instructions when you decide whether the People have proved this special circumstance.

Instruction 520 defines when an act causes death.

If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of kidnapping was merely part of or incidental to the commission of that murder.

1215.

To prove that the defendant committed kidnapping, the People must prove that:

1. The defendant took, held, or detained another person by using force or by instilling reasonable fear;

2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance;

AND

3. The other person did not consent to the movement

AND

4. The defendant did not actually and reasonably believe that the other person consented to the movement.

In order to *consent*, a person must act freely and voluntarily and know the nature of the act.

Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the distance the other person was moved was beyond that merely incidental to the commission of murder, whether the movement increased the risk of physical or psychological harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.

The defendant is not guilty of kidnapping if he reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.

The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if he (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient maturity and understanding to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.

Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it.

3146.

If you find the defendant guilty of the crime of murder charged in Counts 1 or 2, or the lesser crimes of manslaughter, you must then decide whether, for each crime, the People have proved the additional allegation that the defendant personally used a firearm during the commission of that crime. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.

A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.

Someone *personally uses* a firearm if he or she intentionally does any of the following:

1. Displays the firearm in a menacing manner;

2. Hits someone with the firearm;

OR

3. Fires the firearm.

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

3149.

If you find the defendant guilty of the crime of murder as charged in Count 1 and 2 you must then decide whether for each crime, the People have proved the additional allegation that the defendant personally and intentionally discharged a firearm during that crime causing death. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.

To prove this allegation, the People must prove that:

1. The defendant personally discharged a firearm during the commission of that crime;

2. The defendant intended to discharge the firearm;

AND

3. The defendant's act caused the death of a person.

The term *firearm* is defined in another instruction.

Instruction 520 defines when an act causes death.

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

3515.

Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each.

3550.

When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

As I told you at the beginning of the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone. Do not communicate using: during your deliberations.

It is very important that you not use the Internet or a dictionary in any way in connection with this case during your deliberations.

During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. These exhibits will be sent into the jury room with you when you begin to deliberate.

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the issues in this case unless I ask you to do so.

Your verdict on each count and any special findings must be unanimous. This means that, to return a verdict, all of you must agree to it.

It is not my role to tell you what your verdict should be. Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.

You must reach your verdict without any consideration of punishment.

You will be given verdict forms. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict forms and notify the bailiff. If you are able to reach a unanimous decision on only one or only some of the charges, fill in that verdict form only, and notify the bailiff. Return any unsigned verdict form.

3577.

To the alternate juror: The jury will soon begin deliberating, but you are still an alternate juror and are bound by my earlier instructions about your conduct.

Do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends, and not even with each other. Do not have any contact with the deliberating jurors. Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors.

3590.

You have now completed your jury service in this case. On behalf of all the judges of the court, please accept my thanks for your time and effort.

Now that the case is over, you may choose whether or not to discuss the case and your deliberations with anyone.

Let me tell you about some rules the law puts in place for your convenience and protection.

The lawyers in this case, the defendants, or their representatives may now talk to you about the case, including your deliberations or verdict. Those discussions must occur at a reasonable time and place and with your consent.

Please tell me immediately if anyone unreasonably contacts you without your consent.

Anyone who violates these rules is violating a court order and may be fined.

I order that the court's record of personal juror identifying information, including names, addresses, and telephone numbers, be sealed until further order of this court.

If, in the future, the court is asked to decide whether this information will be released, notice will be sent to any juror whose information is involved. You may oppose the release of this information and ask that any hearing on the release be closed to the public. The court will decide whether and under what conditions any information may be disclosed.

Again, thank you for your service. You are now excused.

APPENDIX:
UNITED STATES JURISDICTIONS USING "EACH ELEMENT" OR EQUIVALENT LANGUAGE IN THEIR PATTERN CRIMINAL JURY INSTRUCTIONS[1]

STATES

Alabama

I.7
The defendant is charged with [insert name of offense]. **To convict, the State of Alabama must prove beyond a reasonable doubt each of the elements of [insert name of offense] charged**. … **If you find that the State has failed to prove beyond a reasonable doubt any one or more of the elements of the offense of [insert name of offense], then you cannot find the defendant guilty** of [insert name of offense].

https://judicial.alabama.gov/docs/library/docs/General_Jury_Instructions.pdf

—
The defendant is charged with murder. A person commits the crime of murder if, with intent to cause the death of another person, he/she causes the death of that person or of another person. **To convict**, **the State must prove beyond a reasonable doubt each of the following elements:**
[Elements]
….
If you find that the State has failed to prove beyond a reasonable doubt any one or more of the elements of murder, then you cannot find the defendant guilty of murder.

---

1. Pattern criminal jury instructions of states and federal circuit courts of appeals were complied from Lexis or courts' official websites. Excerpts of relevant instructions are quoted, with target language in bold. "Each element" or equivalent language (e.g., Illinois refers to elements as "propositions") is usually found in general/prefatory instructions, instructions setting out the elements of specific offenses, or both. Where the relevant language is included in specific offenses, a random sample crime is quoted. All links were last visited on July 2, 2022.

Ala. Code 1975, § 13A-6-2(a)(1).
https://judicial.alabama.gov/docs/library/docs/13A-6-2(a)(1).pdf

Alaska

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, 1.06
BEYOND A REASONABLE DOUBT
Revised 2019

To overcome the presumption of innocence, the **prosecution must prove every element of the crime[s] charged beyond a reasonable doubt**.

—
ARRIVING AT A VERDICT –1.35A
SINGLE DEFENDANT, SINGLE COUNT

If you find that the state has proved each element of this offense beyond a reasonable doubt, then you must find the defendant guilty. **If, however, you find that the state has not proved each element of this offense beyond a reasonable doubt, then you must find the defendant not guilty.**

https://courts.alaska.gov/rules/crimins.htm#1

Arizona

Preliminary Criminal 22 -- The Charged Offense
….
The defendant has pled "not guilty" to [this charge] [these charges]. **The State must prove each element of the charged crime beyond a reasonable doubt**. I will give you more details and definitions about the alleged crime in the final jury instructions.

RAJI (Criminal) 5th Preliminary Criminal 22.
—

Standard Criminal 4(a) -- Burden of Proof
The State has the burden of proving the defendant guilty beyond a reasonable doubt. This means the **State must prove each element of each**

charge beyond a reasonable doubt.

RAJI (Criminal) 5th Standard Criminal 4(a).

Arkansas

BURDEN OF PROOF

The State must prove beyond a reasonable doubt each element of the offense charged.

AMCI 2d 107.

Colorado

E:03 PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, AND REASONABLE DOUBT

….

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

….

If you find from the evidence that the prosecution has failed to prove any one or more of the elements of a crime beyond a reasonable doubt, you should find the defendant not guilty of that crime. [P. 196.]

—

3-1:01 MURDER IN THE FIRST DEGREE (AFTER DELIBERATION) The elements of the crime of murder in the first degree (after deliberation) are: [Elements]

After considering all the evidence, **if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty** of murder in the first degree (after deliberation) [P. 1250.]

https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Jury_Instructions/2019/COLJI-Crim%202019%20-%20Final.pdf

Connecticut

1.2-3 Constitutional Principles
…. **Unless you find at the conclusion of all the evidence that the state has proved beyond a reasonable doubt that the defendant has committed every element of an offense, you must find (him/her) not guilty** of that offense
—

2.2-2 Burden of Proof
The defendant does not have to prove (his/her) innocence. This means that the state **must prove beyond a reasonable doubt each and every element necessary to constitute the crime charged.**
—
4.2-2 False Statement -- § 53a-157b [and all substantive crimes]
For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt:
[Elements]
….
If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of false statement to procure the issuance of a payment card, then you shall find the defendant guilty. On the other hand, **if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, you shall then find the defendant not guilty.**

https://www.jud.ct.gov/JI/criminal/Criminal.pdf

Delaware

2.2 VERDICT BASED ON EVIDENCE
[….] **If you find that the State has not proved every element of an offense beyond a reasonable doubt, then you must find the defendant not guilty of that crime.** [p. 8.]

2.6 PRESUMPTION OF INNOCENCE/REASONABLE DOUBT
…. **The burden of proof is upon the State to prove all of the facts necessary to establish each and every element of the crime charged**

beyond a reasonable doubt. [p. 12.]

—

MURDER BY NEGLECT OR ABUSE IN THE SECOND DEGREE

…. In order to find Defendant guilty of Murder by Abuse or Neglect in the Second Degree, **you must find the State has proved the following four (4) elements beyond a reasonable doubt: [Elements].** [p. 256.]

https://courts.delaware.gov/superior/pattern/pdfs/pattern_criminal_jury_rev5_2022a.pdf

Florida

3.7 PLEA OF NOT GUILTY; REASONABLE DOUBT; AND BURDEN OF PROOF

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. **The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt** ….

https://www.floridabar.org/rules/florida-standard-jury-instructions/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-3/

7.4 MURDER — SECOND DEGREE
§ 782.04(2), Fla. Stat.

To prove the crime of Second Degree Murder, the State must prove the following three elements beyond a reasonable doubt: [Elements]

https://www.floridabar.org/rules/florida-standard-jury-instructions/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-7/

Georgia

§ 1.20.10. PRESUMPTION OF INNOCENCE; BURDEN OF PROOF; REASONABLE DOUBT

No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt.

The burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.

2 Ga. Jury Instructions - Criminal § 1.20.10.

Hawaii

3.02. PRESUMPTION OF INNOCENCE; REASONABLE DOUBT

The presumption of innocence is not a mere slogan but an essential part of the law that is binding upon you. **It places upon the prosecution the duty of proving every material element of the offense charged against the defendant beyond a reasonable doubt.**

HAWJIC 3.02 (Revised 6/29/00).
—

5.01 GENERIC ELEMENTS INSTRUCTION [In Count (count number) of the Indictment/Complaint/Information, the] [The] Defendant (defendant's name) is charged with the offense of (charge).
A person commits the offense of (charge) if he/she (track statutory language).
There are (number) material elements of the offense of (charge), each of which the prosecution must prove beyond a reasonable doubt.
These (number) elements are: 1. 2.**.**

HAWJIC 5.01 (Revised 5/4/09).
https://www.courts.state.hi.us/docs/docs4/crimjuryinstruct.pdf

Idaho

ICJI 704A FIRST DEGREE MURDER - MALICE AFORETHOUGHT INSTRUCTION NO.

In order for the defendant to be guilty of First Degree Murder with malice aforethought, the state must prove each of the following: [Elements]

If you find that the state has failed to prove beyond a reasonable doubt any of the elements one(1) - five(5) above or failed to prove any of the circumstances listed in element six(6), you must find the defendant not guilty of First Degree Murder.

ICJI 704A.
https://isc.idaho.gov/main/criminal-jury-instructions

Illinois

7.02
Issues In First Degree Murder
To sustain the charge of first degree murder, the State must prove the following propositions: [Propositions/elements]
If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/4ca60c86-cef3-465a-83ae-9cc61d159640/CRIM_07.00.pdf

Indiana

Instruction No. 1.1300. Presumption of Innocence.
To overcome the presumption of innocence, **the State must prove the Defendant guilty of each element of the crime charged, beyond a reasonable doubt.**
—
Instruction No. 1.1500. Burden of Proof—Reasonable Doubt.
The **State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt.**—
Instruction No. 3.0100. Murder—Killing a Human Being.
Before you may convict the Defendant, the **State must have proved each of the following beyond a reasonable doubt**: [Elements]
If the State **failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty** of murder, a felony, charged in Count [].

http://www.indianajudgesassociation.org/pdf/IJA%20Public%20Access%20Criminal%20Pattern%20Instructions.pdf

Iowa

3100.1 Securities Fraud-Elements.
The State must prove all of the following elements of Securities Fraud: [Elements]
If the State has failed to prove each of these elements, the defendant is not guilty.

Iowa J.I. Crim. § 3100.1.

Kansas

BURDEN OF PROOF, PRESUMPTION OF INNOCENCE, REASONABLE DOUBT

The test you must use in determining whether the defendant is guilty or not guilty is this: **If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty.** [p. 43.]
PIK Crim. 4th 51.010 (2017 Supp.).

58.120 BURGLARY
The defendant is charged with burglary. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved: [Claims/elements] [p.537.]
PIK Crim. 4th 58.120.

https://ia903405.us.archive.org/19/items/kansas.pik.criminal.4th/kansas.pik.criminal.4th.pdf

Kentucky

You will find the Defendant guilty of First-Degree Robbery under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following: [Elements].

Cooper, Kentucky Instructions to Juries, § 6.14

Louisiana

The burden is always on the state to prove each element of the offense charged beyond a reasonable doubt.
17 La. Civ. L. Treatise, Criminal Jury Instructions § 2.1 (3d ed.)

The defendant is presumed to be innocent until each element of the crime necessary to constitute his guilt is proven beyond a reasonable doubt.
17 La. Civ. L. Treatise, Criminal Jury Instructions § 3.2 (3d ed.)

Maine

"The State always has the burden to prove each element of the offense charged beyond a reasonable doubt."
1 Maine Jury Instruction Manual § 6-7 (2022)

Maryland

"The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. **This means that the State has the burden of proving, beyond a reasonable doubt, each and every element of the crime [crimes] charged. The elements of a crime are the component parts of the crime about which I will instruct you shortly.**
Maryland Criminal Pattern Jury Instructions (2d ed. 2018) 2:02.

Massachusetts

1.120 PRELIMINARY INSTRUCTION TO JURY BEFORE TRIAL
As you have heard, the defendant is charged with the crime(s) of _____.
The Commonwealth must prove each of the elements which make up (that crime) (those crimes). Those elements are as follows:
[Here set out the elements of each offense.]
—
https://www.mass.gov/doc/1120-preliminary-instruction-to-jury-before-trial/download

1.140 ALTERNATE PRELIMINARY INSTRUCTION TO JURY BEFORE

TRIAL
Offense(s) charged. The defendant is charged with the crime(s) of: _____ .
The essential elements of the crime(s) are: _____ .
Burden of proof. The Commonwealth has the burden to prove the existence of each of those essential elements beyond a reasonable doubt.

https://www.mass.gov/doc/1140-alternate-preliminary-instruction-to-jury-before-trial/download

—
Instruction 8.520 Revised November 2021 LARCENY BY STEALING
G.L. c. 266, § 30
The defendant is charged with larceny by stealing. **In order to prove the defendant guilty of this offense, the Commonwealth must prove the following three things beyond a reasonable doubt.**

[Elements]

https://www.mass.gov/doc/8520-larceny-by-stealing-gl-c-266-ss-30/download

Michigan

M Crim JI 3.2 Presumption of Innocence, Burden of Proof, and Reasonable Doubt
….
(2) Every crime is made up of parts called elements. **The prosecutor must prove each element of the crime beyond a reasonable doubt. T**he defendant is not required to prove [his / her] innocence or to do anything. *** If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.**

M Crim JI 3.2.
—

(1) The defendant is charged with the crime of larceny**. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:** [Elements]
M Crim JI 23.1 Larceny.

Minnesota

Simple Robbery
The elements of the crime are: [Elements]
…. **If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.**

10 Minn, Prac., Jury Instr. Guides—Criminal CRIMJIG 14.02 (6th ed,)

Mississippi

108 General Pattern Instruction
[Name of defendant] has been charged in count with [specify crime charged].
If you find beyond a reasonable doubt from the evidence in this case that:
[Elements] then you shall find [name of defendant] guilty as charged.
I**f the State did not prove any one of the above listed elements beyond a reasonable doubt, then you shall find [name of defendant] not guilty**....

MSJI Criminal § 108.

Missouri

Petitioner was unable to access Missouri's pattern instructions directly but below are recent cases quoting pertinent pattern instructions.

"[U]nless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense."
In re: Revision to MAI-CR 4th, 2021 Mo. LEXIS 141, at *1-3 (Apr. 6, 2021) (citing MAI-CR 4th 419.18).

"**[U]nless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense**."
State v. Hendricks, 619 S.W.3d 171, 180 (Mo. Ct. App. 2021) (citing MAI-CR 4th 424.00).

Montana

INSTRUCTION NO. [1-122]
[Constitutional Right of Defendant Not to Testify]
In deciding whether or not to testify, the Defendant may choose to rely on the state of the evidence and upon the failure, if any, of the State to prove beyond a reasonable doubt every essential element of the charge against him.
—

INSTRUCTION NO. [5-101(a)]
[Issues in Deliberate Homicide—Not Felony Murder]
To convict the Defendant of deliberate homicide, the State must prove the following elements: [Elements]
…. If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

MCJI 5-101(a) (2018 Supp.)
—
INSTRUCTION NO. [5-118(a)]
[Issues in Stalking]
To convict the Defendant of stalking, the State must prove the following elements: [Elements]
If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty. **If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the Defendant not guilty.**

MCJI 5-118(a) (2009).

—
[….]

B. EFFECT OF FINDINGS
If you decide that the state proved each element beyond a reasonable

doubt then you must find the defendant guilty. Otherwise, you must find the defendant not guilty.

Nebraska

You must separately consider the (here insert number) crimes charged. For each crime your task is the same. **If you decide that the state proved each element (of, regarding) that particular crime beyond a reasonable doubt, then you must find the defendant guilty of that crime. Otherwise, you must find the defendant not guilty of that crime.**

NJI 2d Crim. 3.0.

New Jersey

In order for you to find the defendant guilty of robbery, the **State is required to prove each of the following elements beyond a reasonable doubt:** [Elements]

NJ CR JI 2C:15-1.

New Hampshire

RSA 630:1-a, I(a) First degree murder
The defendant is charged with the crime of first degree murder. **The definition of this crime has three parts or elements. The State must prove each element beyond a reasonable doubt.**

New Mexico

14-5060 NMRA

For you to find the defendant guilty of first degree murder by a deliberate killing [as charged in Count]1, the **state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime**: [Elements]
14-201 NMRA

—
For you to find the defendant guilty of battery [as charged in Count]1, t**he state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime**: [Elements]

14-320 NMRA.

New York

Burden of Proof
The defendant is not required to prove that he/she is not guilty. In fact, the defendant is not required to prove or disprove anything. To the contrary, the People have the burden of proving the defendant guilty beyond a reasonable doubt. That means, **before you can find the defendant guilty of a crime, the People must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed that crime**.

https://nycourts.gov/judges/cji/5-SampleCharges/SampleCharges.shtml
["Model Final Instructions" p. 14.]

North Carolina

COMMON LAW ROBBERY. FELONY.
For you to find the defendant guilty of this offense, the State must prove six things beyond a reasonable doubt:
[Elements]
....
If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty

N.C.P.I.—Crim 217.10.

https://www.sog.unc.edu/sites/www.sog.unc.edu/files/pji-master-2019/criminal/r217.10[2016].pdf

North Dakota

Before the Defendant can be convicted, the State must prove all the essential elements of the offense beyond a reasonable doubt.

ND. J.I. Crim. § 1.05.
—

The State must prove all of the essential elements of the crime charged by proof beyond a reasonable doubt. In other words, if you have a reasonable doubt that the Defendant committed the crime, then you must find the Defendant not guilty.

ND. J.I. Crim. § 1.10.

Ohio

1. The defendant(s) is (are) presumed innocent until his (their) guilt is established beyond a reasonable doubt. **The defendant(s) must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of every essential element of the offense charged** in the indictment (information) (complaint) (or of any lesser offense included within that charge).

2 OJI CR 405.05 (2020).

Oklahoma

No person may be convicted of shooting with intent to kill unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

OUJI-CR § 4-4.
—

No person may be convicted of distributing a controlled dangerous substance unless the State has proved beyond a reasonable doubt each element of the crime.

OUJI-CR § 6-2.
—

10-4 GENERAL CLOSING CHARGE - PRESUMPTION OF INNOCENCE
….

The defendant must be found not guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the crime.

OUJI-CR § 10-4.

Oregon

In this case, **to establish the crime of murder, the state must prove beyond a reasonable doubt the following elements:** [Elements]

Or. UCrJI No. 1308.

Pennsylvania

§ 7.01. PRESUMPTION OF INNOCENCE-BURDEN OF PROOF-REASONABLE DOUBT
….
2. It is not the defendant's burden to prove that [he] [she] is not guilty. Instead, i**t is the Commonwealth that always has the burden of proving each and every element of the crime charged and that the defendant is guilty of that crime beyond a reasonable doubt.** ….
….

Pa. SSJI (Crim) 7.01.
—

§ 15.4304B. ENDANGERING WELFARE OF A CHILD-COURSE OF CONDUCT

1. The defendant has been charged with endangering the welfare of a child as

a course of conduct. To find the defendant guilty of this offense, y**ou must find that each of the following four elements has been proven beyond a reasonable doubt:** [Elements]

Pa. SSJI (Crim)15.4304B.

—

"§ 15.5121A. ESCAPE-WHERE INMATE/DETAINEE IS DEFENDANT

1. The defendant has been charged with the offense of escape. **To find the defendant guilty of this offense, you must find that the following elements have been proven beyond a reasonable doubt:** [Elements]
Pa. SSJI (Crim)15.5121A.

Rhode Island

RI does not have pattern criminal instructions, but case law shows common use of "each and every element" language in instructions given there:

"The Superior Court justice instructed the jury as follows: 'The burden of proof is on the State from the beginning to the end of the trial. It never shifts. **It is the State which has the burden of proof beyond a reasonable doubt to prove each and every element of the offenses.…"**
State v. Cavanaugh 158 A.3d 268, 277 n.7. (R.I. 2017).

"The trial justice issued prefatory instructions about the presumption of innocence and about the **state's obligation to prove beyond a reasonable doubt: the existence of 'each and every element of any offense charged.'"**
State v. Fuentes, 162 A.3d 638, 645 (R.I. 2017).

"The first-degree murder instruction provided, in pertinent part, as follows: 'In order for you to convict the defendants of first degree murder, y**ou must find beyond a reasonable doubt that each of the following elements exists:….'"**
State v. Ros, 973 A.2d 1148, 1166, n. 19 (R.I. 2009).

South Carolina

The State has the burden of proving the defendant guilty beyond a reasonable doubt. **The State is required to prove every element of the charged offense by evidence which satisfies the jury of the guilt of the defendant beyond a reasonable doubt**.

SC JI CRIMINAL § 1-5.

South Dakota

1-5-1 BURDEN OF PROOF
The state has the burden of proving every element of the offense charged beyond a reasonable doubt.

SD Crim. 1-5-1 .
—
1-19-2 JURY — FINDINGS — GENERAL AS TO ELEMENTS OF OFFENSE
If under the court's instructions and the evidence you find beyond a reasonable doubt that the defendant committed the acts constituting the elements of the offense charged, then it is your duty to find the defendant guilty.

If any member of the jury, has any reasonable doubt that the defendant committed the offense charged, or any reasonable doubt upon any single fact or element necessary to constitute the offense charged as defined for you by the court, then it is that juror's duty to give the defendant the benefit of the doubt and vote for a verdict of not guilty.
SD Crim. 1-19-2 (2020).
—

3-8-6 TAMPERING WITH A WITNESS — BRIBE — ELEMENTS
Instruction No. ___
The elements of the crime of tampering with a witness, each of which the state must prove beyond a reasonable doubt, are that at the time

and place alleged: [Elements]

SD Crim. 3-8-6 (2020 Edition).

Tennessee

§ 2.03 REASONABLE DOUBT
Reasonable doubt is that doubt created by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and **this certainty is required as to every element of proof necessary to constitute the offense.**

T.P.I. Criminal 2.03.

§ 2.04 BURDEN OF PROOF: ELEMENTS AND DATE OF THE OFFENSE
The **state must have proven beyond a reasonable doubt all of the elements of the crime charged**, and that it was committed before the finding and returning of the indictment in this case.

T.P.I. Criminal 2.04.

For you to find the defendant guilty of this offense, **the state must have proven beyond a reasonable doubt the existence of the following essential elements**:….

T.P.I. Criminal 7.01.

Texas

Burden of Proof
The state must prove every element of the offense beyond a reasonable doubt to establish guilt for the offense . . . . If the state does not prove every element of the offense beyond a reasonable doubt, then you must find the defendant not guilty.

Texas Criminal Pattern Jury Charges § CPJC 2.1.

—
To prove that the defendant is guilty of robbery, the state must prove, beyond a reasonable doubt, three elements. The elements are that—[Elements]

Texas Criminal Pattern Jury Charges § CPJC 87.1.

Utah

Every crime has component parts called "elements." The prosecution must prove each element beyond a reasonable doubt.

MUJI 2d CR CR102.

CR301 Elements.
The defendant, (NAME), is charged [in Count] with [CRIME]on or about [DATE]. **You cannot convict (him)(her) of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:** [Elements]
…. [I]f you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

MUJI 2d CR CR301.

Vermont

§ 021 Proof of Essential Elements
…. **If, in your judgment, the State has not proven each of the essential elements beyond a reasonable doubt, then you must find (Def)_____ not guilty.**

VT Criminal Jury Instructions § 1-4-021.
—

The State bears the burden of proof. This means that the State must prove each of the essential elements of the crime charged beyond a reasonable doubt.

VT Criminal Jury Instructions § 1-4-101.
—
Every crime is made up of essential elements. Before (Def)_____ can be found guilty of the charge, the State must have proven each of the essential elements beyond a reasonable doubt.
VT Criminal Jury Instructions § 2-21-011.

Virginia

Instruction No. 2.100 Reasonable Doubt and Presumption of Innocence
This **presumption of innocence . . . require[s] you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the crime beyond a reasonable doubt.** [p. 5.]

Instruction No. 12.400 Possession of Burglary Tools
The defendant is charged with the crime of possession of burglary [tools; implements; outfit] with intent to commit [burglary; robbery; larceny]. The Commonwealth **must prove beyond a reasonable doubt each of the following elements of that crime**: [Elements]
If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty. [P. 560.]

https://www.vacourts.gov/courts/circuit/resources/model_jury_instructions_criminal.pdf

Washington

WPIC 4.01 Burden Of Proof—Presumption Of Innocence—Reasonable Doubt
[The] [Each] defendant has entered a plea of not guilty. That plea **puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt.**
https://govt.westlaw.com/wcrji/Document/Ief9ba3b5e10d11daade1ae871d9b2cbe?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

WPIC 4.21 Elements of the Crime
To convict the defendant of the crime of , each of the following elements of the crime must be proved beyond a reasonable doubt:
[Elements]
….[I]f, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
https://govt.westlaw.com/wcrji/Document/Ief9bcac3e10d11daade1ae871d9b2cbe?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

West Virginia

2.03 (Preliminary) The Indictment—Presumption of Innocence—Elements

"**The State has the burden or obligation to prove each of the essential elements of the crime(s) charged in the indictment to you beyond a reasonable doubt**." 2.03
—
Before the defendant can be convicted of Malicious Assault, the State must overcome the presumption that the defendant is innocent and prove beyond a reasonable doubt that: [Elements]
…. **If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the defendant not guilty** of Malicious Assault."

7.2.16.1. (Effective June 29, 2017).

https://pds.wv.gov/attorney-and-staff-resources/research-center/legal-resources/Pages/JuryInstructions7th.aspx

Wisconsin

140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the

evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

https://wilawlibrary.gov/jury/files/criminal/0140.pdf

—

1400 CRIMINAL DAMAGE TO PROPERTY — § 943.01

Before you may find the defendant guilty of this offense, the **State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.** [Elements]
Jury's Decision
If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.
If you are not so satisfied, you must find the defendant not guilty.

https://wilawlibrary.gov/jury/files/criminal/1400.pdf

Wyoming

1.03. PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT
In order to convict the defendant of the crime charged, **every material and necessary element to constitute such a crime must be proved beyond a reasonable doubt. If the Jury has a reasonable doubt on any necessary element, it is your duty to give the benefit of such doubt to the defendant and acquit him.**

WCPJI (Criminal) 1.03 (2019 Edition).

—

1.05. DEFENDANT NEED NOT PRESENT EVIDENCE
The **burden is always on the State to prove the defendant's guilt beyond a reasonable doubt as to each element of the offense.**

WCPJI (Criminal) 1.05 (2019 Edition).

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Cite as WCPJI (Criminal) 24.02A...
WCPJI (Criminal) 24.02A (2019 Edition).

FEDERAL

1st Circuit

3.02 Presumption of Innocence; Proof Beyond a Reasonable Doubt
…. **It is always the government's burden to prove each of the elements of the crime[s] charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from that evidence.** [P. 66.]

4.18.1028A Aggravated Identity Theft, 18 U.S.C. § 1028A

For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt: [Elements] [p. 185.]
https://www.med.uscourts.gov/sites/med/files/crpjilinks.pdf

2d Circuit

The Second Circuit does not issue pattern criminal instructions.

3d Circuit

1.07 Description of Trial Proceedings
…. As I will tell you many times during this trial, the government always has **the burden or obligation to prove each and every element of the offense(s) charged beyond a reasonable doubt.**
—

1.12 Elements of the Offense(s) Charged The defendant (name) is charged in the indictment with committing the offense of (state the offense charged). To help you follow the evidence, **I will now give you a brief summary of the elements of that offense, each of which the government must**

prove beyond a reasonable doubt in order to convict (name) of the offense charged.

—

3.06 Presumption of Innocence; Burden of Proof; Reasonable Doubt
In order for you to find *(name)* guilty of the offense*(s)* charged, the government must convince you that *(name)* is guilty beyond a reasonable doubt. That means that the **government must prove each and every element of the offense*(s)* charged beyond a reasonable doubt.**

https://www.ca3.uscourts.gov/sites/ca3/files/2012%20Chapter%201_0.pdf

4th Circuit (D.SC)

B. Burden of Proof
The government must prove each element of the crime charged to each and every one of you beyond a reasonable doubt

—

18 U.S.C. § 3 ACCESSORY AFTER THE FACT Title 18, United States Code, Section 3 makes it a crime to give assistance to a person who has committed a federal crime. **For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:**
[Elements] [P. 10.]

2020 Online Edition PREFACE Many federal circuits have pattern jury instructions formulated by committees of judges and practitioners and approved by the circuit for use in criminal cases. The Fourth Circuit does not. Thus, the purpose of this work, PatternCriminal Instructions for Criminal Cases District of South Carolina, is to fill that void by publishing pattern instructions annotated primarily by reference to Fourth Circuit and Supreme Court cases
http://www.scd.uscourts.gov/pji/PatternJuryInstructions.pdf

5th Circuit

2.05

—

ACCESSORY AFTER THE FACT

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt: [Elements] [p. 124.]

https://www.lb5.uscourts.gov/juryinstructions/

6th Circuit

1.03 PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT
….
(4) **The government must prove every element of the crime charged beyond a reasonable doubt.**
—

2.02 DEFINITION OF THE CRIME
(1) Count ___ of the indictment accuses the defendant of _____ in violation of federal law.
For you to find the defendant guilty of this crime, **you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:**
[Elements]

https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/crmpattjur_full.pdf

7th Circuit

PRESUMPTION OF INNOCENCE/BURDEN OF PROOF
….
The government has the burden of proving every element of the crime[s] charged beyond a reasonable doubt.
—

4.01 BURDEN OF PROOF—ELEMENTS
[The indictment charges the defendant[s] with;
Count[s] — of the indictment charge[s] the defendant[s] with] [name of offense].
In order for you to find [the; a] defendant guilty of this charge, the

government must prove each of the [fill in number of elements] following elements beyond a reasonable doubt: [Elements]. [P. 90.]

https://www.ca7.uscourts.gov/pattern-jury-instructions/pattern_criminal_jury_instructions_2020edition.pdf

8th Circuit

3.05 Description of Charge; Indictment Not Evidence; Presumption of Innocence; Burden of Proof (Single Defendant, Single Count)
…..The **presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the [government] [prosecution] proved during the trial, beyond a reasonable doubt, each element of the crime charged**. [P. 68.]

https://juryinstructions.ca8.uscourts.gov/instructions/criminal/Criminal-Jury-Instructions.pdf

9th Circuit

3.2 CHARGE AGAINST DEFENDANT NOT EVIDENCE— PRESUMPTION OF INNOCENCE—BURDEN OF PROOF
… **The defendant does not have to prove innocence; the government has the burden of proving every element of the charge[s] beyond a reasonable doubt.** [P. 43.]
—
8.1 ARSON OR ATTEMPTED ARSON (18 U.S.C. § 81)
…. In order for the defendant to be found guilty of that charge, the government **must prove each of the following elements beyond a reasonable doubt**: [Elements] [P. 152.]

https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2021_9_0.pdf

10th Circuit
2.01 FOOD STAMPS—UNAUTHORIZED USE
….**To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a**

reasonable doubt: [Elements] [P. 72.]

https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20Version.pdf

11th Circuit

O5.1
Bribery of a Public Official 18 U.S.C. § 201(b)(1)

The Defendant **can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:** [Elements] [p. 113.]

https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsRevisedAUG2021.pdf

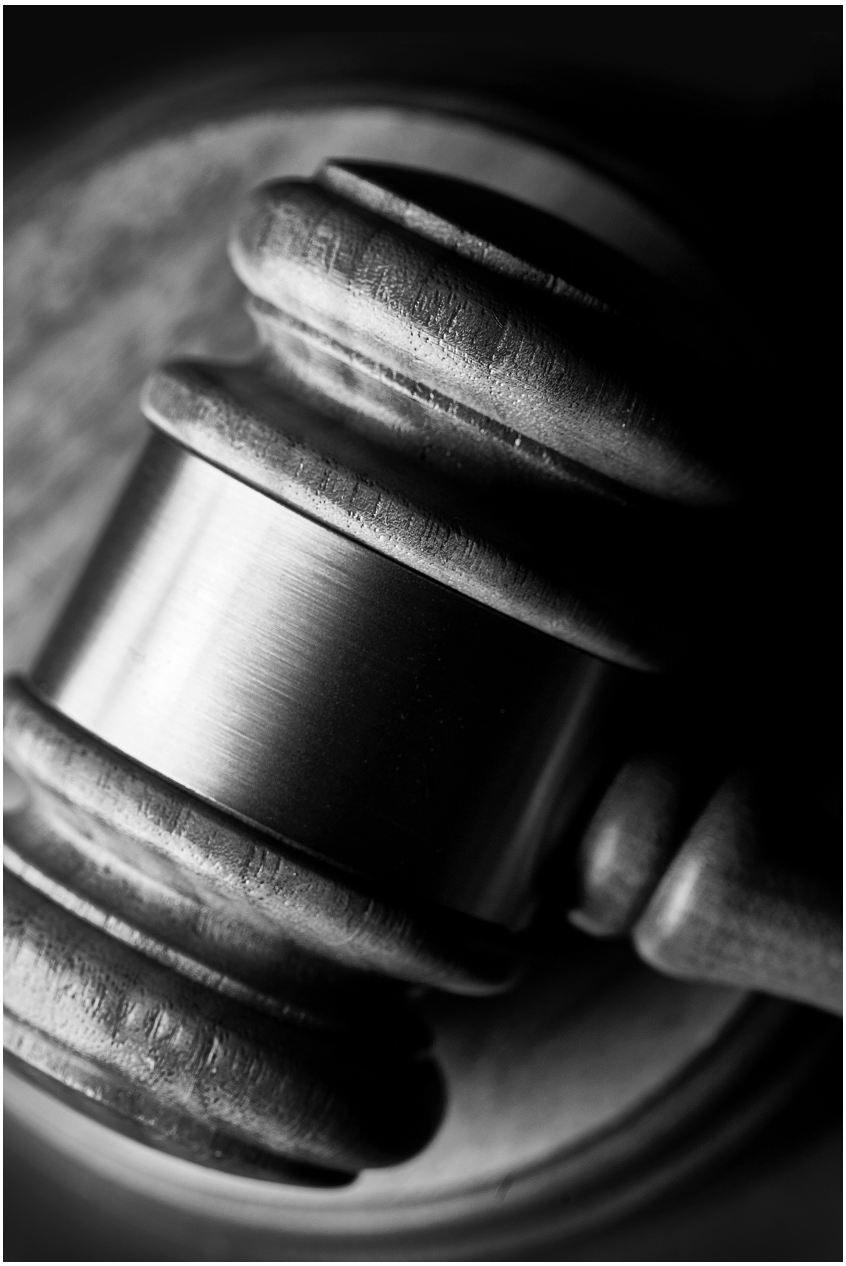
DC Circuit

No criminal pattern jury instructions found.

Table 5.4
U.S. District Courts—Criminal Defendants Disposed of, by Method of Disposition, During the 12-Month Periods Ending June 30, 1990, and September 30, 1995 Through 2021

Fiscal Year	Total Defendants	Not Convicted					Convicted and Sentenced				
		Total	Percent of Total Defendants	Dismissed	Acquitted by		Total	Percent of Total Defendants	Plea of Guilty [1]	Convicted by	
					Bench Trial	Jury Trial				Bench Trial	Jury Trial
2021	63,725	5,209	8	5,013	55	141	58,516	92	57,631	108	777
2020	71,485	5,372	8	5,173	75	124	66,113	92	64,887	132	1,094
> 2019	85,478	6,711	8	6,424	80	> 207	78,767	92	77,104	181	> 1,482
2018	79,704	6,595	8	6,275	83	237	73,109	92	71,550	135	1,424
2017	75,163	6,147	8	5,871	80	196	69,016	92	67,418	178	1,420
2015	81,024	7,899	10	7,610	85	204	73,125	90	71,330	145	1,650
2010	98,311	8,570	9	8,147	137	286	89,741	91	87,418	257	2,066
2005	86,000	8,661	10	8,141	159	361	77,339	90	74,024	291	3,024
1995	54,980	8,207	15	7,112	482	613	46,773	85	43,103	467	3,203
1990 [2]	56,519	9,794	17	8,193	630	971	46,725	83	40,452	1,063	5,210

Note: Due to a change in methodology, numbers for years prior to 2015 may not match numbers previously published in this table.
[1] Includes nolo contendere cases.
[2] Twelve-month period ending June 30.
Source: Table D-4, *Annual Report of the Director: Judicial Business of the United States Courts.*



2021 Court Statistics Report

Statewide Caseload Trends

2010–11 Through 2019–20

JUDICIAL COUNCIL
OF CALIFORNIA

Caseflow Management Data
Trials By Type of Proceeding
Fiscal Years 2010–11 through 2019–20

Superior Courts
Data for Figures 60–72

Get this graphic

Jury Trials

	Total (A)	Felony (B)	Misdemeanors (C)	PI/PD/WD Civil Unlimited (D)	Other Civil Unlimited (E)	Civil Limited (F)	Probate and Mental Health (G)
FY20	5,251	2,637	1,378	539	369	265	63
> FY19	6,841	> 3,221	> 2,030	723	402	350	115
FY18	7,610	3,919	2,438	649	458	121	25
FY17	8,077	4,254	2,443	687	442	229	22
FY16	9,218	4,784	3,019	687	462	232	34
FY15	9,472	4,796	2,909	712	519	491	45
FY14	9,950	5,541	2,754	738	489	242	186
FY13	9,478	4,923	2,883	747	533	333	59
FY12	10,038	5,296	3,001	730	473	510	28
FY11	10,129	5,691	2,958	684	533	228	35

Court Trials

	Total (A)	Felony (B)	Misdemeanor and Infractions (C)	PI/PD/WD Civil Unlimited (D)	Other Civil Unlimited (E)	Civil Limited (F)	Probate and Mental Health (G)
FY20	341,859	552	236,417	492	30,528	17,452	56,418
FY19	392,409	404	280,131	486	32,787	22,752	55,849
FY18	314,656	470	220,941	862	35,829	16,521	40,033
FY17	376,524	263	281,742	738	34,805	21,387	37,589
FY16	429,138	316	336,003	578	33,101	25,349	33,791
FY15	482,212	283	384,226	763	34,004	31,712	31,224
FY14	475,218	598	377,675	831	31,702	31,656	32,756
FY13	472,035	600	362,435	938	33,245	44,491	30,326
FY12	535,288	677	421,903	1,354	33,789	47,340	30,225
FY11	528,656	592	415,601	2,185	34,570	45,089	30,619

Column Key:

(B) Includes trials where felonies were reduced to misdemeanors.

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Advisory Committee on Criminal Jury Instructions
Hon. Sandra L. Margulies, Chair
Robin Seeley, Attorney, 415-865-7710,
robin.seeley@jud.ca.gov

DATE: July 13, 2006

SUBJECT: Jury Instructions: Approve Publication of Revisions and Additions to Criminal Jury Instructions (Action Required)

Issue Statement
The Advisory Committee on Criminal Jury Instructions has completed its first set of revisions and additions to the Judicial Council Criminal Jury Instructions (CALCRIM) that were first published in 2005.

Recommendation
The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective August 25, 2006:

1. Approve for publication under rule 855(d) of the California Rules of Court the new and revised criminal jury instructions prepared by the advisory committee. On Judicial Council approval, the instructions will be officially published in the new edition of CALCRIM; and
2. Approve the insertion of code section references in the titles and introductory paragraphs of every CALCRIM instruction that charges a statutory offense.

The table of contents for the proposed revisions and additions to the jury instructions is attached at pages 5—7. The revised and new criminal jury instructions are included separately with this report.

Rationale for Recommendation
The Task Force on Jury Instructions was appointed in 1997 on the recommendation of the Blue Ribbon Commission on Jury System Improvement. The mission of the task force was to draft comprehensive, legally accurate jury instructions that are readily understood

Comments From Interested Parties

All revisions and additions to the criminal jury instructions were circulated for public comment, with the exception of two urgent updates to CALCRIM Nos. 2180 and 2181, both of which instruct on "evading a peace officer." The definition of "distinctively marked vehicle" was revised in both of those instructions to reflect the Supreme Court's recent ruling in *People v. Hudson* (2006) 38 Cal.4th 1002, which was decided on June 19, 2006, after the close of the public comment period. That case held that a distinctively marked vehicle must now have one additional distinctive feature in addition to a red lamp and siren.

The advisory committee received many comments from court executives, criminal defense attorneys, district attorneys, and trial judges. The advisory committee evaluated the comments and made changes to the instructions based on the recommendations. A chart summarizing the public comments and the committee response is included at pages 8–24.

> The revisions that generated the most attention from commentators were those involving CALCRIM No. 220, the reasonable doubt instruction. Many members of the criminal defense bar objected to deleting the reference to the elements of the offense. The advisory committee had chosen to delete this language in response to a comment from a judge who noted that the reference to the elements was inappropriate in a case where the only issue was the identity of the perpetrator. After careful consideration of the
> comments, the advisory committee decided to retain the proposed changes, which deleted that reference because the reference to the elements is not legally necessary and its deletion makes the instruction appropriate for use in all cases, including those in which identity of the perpetrator is the only issue.

Implementation Requirements and Costs

Implementation costs will be minimal. Under the publication agreement, the official publisher will make copies of the update available to all judicial officers free of charge. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC will provide a broad public license for their use and reproduction by noncommercial publishers. With respect to commercial publishers other than the official publisher, the AOC will license their publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters that may be necessary.

Attachments

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 4

The People v. Gonzales
Brian Gonzales
B306537
LOS ANGELES No. LA082639

THE COURT:

Pursuant to appellant's request for appointment of counsel, and under the authority of Penal Code Section 1240, subdivision (a) (1), the following attorney is appointed counsel for appellant on this appeal:

Mark Yanis

Appellant's opening brief shall be filed within thirty days from the date of this order.

Appellant is directed to keep the court informed of his/her mailing address at all times. If you move, you MUST notify the clerk of this court immediately; otherwise you may not receive important notices concerning your appeal.

MANELLA, P.J.
Presiding Justice

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